

FILED

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF ILLINOIS, IN 1982
 EASTERN DIVISION

ATARI, INC.,)
 a Delaware corporation, and)
 MIDWAY MFG. CO.,)
 an Illinois corporation,)
 Plaintiffs,)
 vs.) Civil Action No. 81 C 6434
 NORTH AMERICAN PHILIPS)
 CONSUMER ELECTRONICS CORP.,)
 a Tennessee corporation, and)
 PARK TELEVISION d/b/a)
 PARK MAGNAVOX HOME ENTERTAINMENT)
 CENTER,)
 an Illinois partnership, and)
 ED AVERETT,)
 an individual,)
 Defendants.)

MARCH 19 1982
DOCKETED

ANSWER OF DEFENDANTS NORTH AMERICAN PHILIPS
 CONSUMER ELECTRONICS CORP. AND PARK TELEVISION
 d/b/a PARK MAGNAVOX HOME ENTERTAINMENT
 CENTER TO THE AMENDED COMPLAINT, AND COUNTERCLAIM

Defendants NORTH AMERICAN PHILIPS CONSUMER ELECTRONICS
 CORP. and PARK TELEVISION d/b/a PARK MAGNAVOX HOME ENTERTAINMENT
 CENTER (hereinafter "North American" and "Park," respectively)
 for their answer to the Amended Complaint herein, allege the
 following, each paragraph of the Amended Complaint being set
 forth preceding the answer thereto.

1. Amended Complaint. Plaintiff, ATARI, INC. ("ATARI"), is a Delaware corporation with its principal place of business in Sunnyvale, California. ATARI is a leading developer and manufacturer of home video games and personal computers. ATARI owns the exclusive rights under copyrights to numerous audiovisual works, including the exclusive rights in the United States for home video and personal computer use for the PAC-MAN video game described below.

Answer. Defendants North American and Park admit that ATARI is a Delaware corporation with its principal place of business in Sunnyvale, California, and that ATARI is a developer and manufacturer of personal computers and video games including home video games, but defendants North American and Park are without knowledge of the remaining allegations of paragraph 1 of the Amended Complaint and, therefore, deny the same.

2. Amended Complaint. Plaintiff MIDWAY MFG. CO. ("MIDWAY") is an Illinois corporation with its principal place of business at Franklin Park, Illinois. MIDWAY is a leading developer and manufacturer of coin-operated video games. MIDWAY owns exclusive rights under copyrights to numerous audiovisual works and is the owner of the United States copyright and trademark to the PAC-MAN audiovisual work described below...

Answer. Defendants North American and Park admit that plaintiff MIDWAY is an Illinois corporation with its principal place of business at Franklin Park, Illinois, and that MIDWAY is a developer and manufacturer of coin-operated video games, but defendants North American and Park are without knowledge of the remaining allegations of paragraph 2 of the Amended Complaint and, therefore, deny the same.

3. Amended Complaint. On information and belief, defendant North American Philips Consumer Electronics Corp. ("North American") is a Tennessee corporation, with its principal place of business in Knoxville, Tennessee. North American or a North American agent has an office and place of business in this District. North American itself or through its subsidiaries, agents or affiliated or related corporations manufactures and sells home video games, including the K.C. Munchkin home video game described below.

Answer. Defendants North American and Park admit that North American or a corporation related to it has manufactured and sold home video games and home video game cartridges including the Odyssey² home video game console and the "K.C. MUNCHKIN" home video game cartridge for use with that console, but otherwise deny the allegations of Paragraph 3 of the Amended Complaint.

4. Amended Complaint. Defendant Park Magnavox Home Entertainment Center ("Park") is an Illinois corporation with its principal office and place of business at 3634 West 95th Street, Evergreen Park, Illinois 60642. Park is a retailer of audio visual equipment including home video game consoles and cartridges including the K.C. Munchkin video game.

Answer. Defendants North American and Park deny that PARK TELEVISION d/b/a PARK MAGNAVOX HOME ENTERTAINMENT CENTER is an Illinois corporation, affirmatively allege that it is a partnership, admit that Park is a retailer of audio visual equipment including home video game consoles and home video game cartridges such as the Odyssey² home video game console and the "K.C. MUNCHKIN" home video game cartridge, that Park's principal office and place of business is at 3634 West 95th Street, Evergreen Park, Illinois 60642, but otherwise deny the allegations of Paragraph 4 of the Amended Complaint.

5. Amended Complaint. On information and belief, defendant Ed Averett ("Averett") is an individual residing in Hixson, Tennessee. Averett is a computer programmer, who along with his wife, developed a home video game known as K.C. Munchkin and other home video games for North American or a corporation related to it. Averett developed K.C. Munchkin with the intent and knowledge that North American directly or indirectly would distribute it nationally. Averett has received and continues to receive royalties or other payments from North American or a corporation related to it resulting from his development of and the nationwide sales of K.C. Munchkin.

Answer. Defendants North American and Park admit that Ed Averett is an individual residing in Tennessee, that Averett and his wife both participated in the development of a home video game known as K. C. Munchkin and other home video games for North American or a corporation related to it, and that Averett has received royalties or other payments from North American or a corporation related to it resulting from sales of K. C. Munchkin, and defendants North American and Park are without knowledge of any of the remaining allegations of Paragraph 5 of the Amended Complaint and, therefore, deny the same.

6. Amended Complaint. The claims in this Amended Complaint arise under the Copyright Laws of the United States, 17 U.S.C. §§101 et seq., the Lanham Act of 1946 as amended, 15 U.S.C. §1051 et seq., the Illinois Uniform Deceptive Trade Practices Act, Ill.Rev.Stat. Ch. 121-1/2, §§311-317, and the common law. This Court has federal question jurisdiction pursuant to 28 U.S.C §1331(a)(2) and 1338(a) and has pendant jurisdiction over the state law claims under 28 U.S.C. §1338(b). Venue is proper under 28 U.S.C. §§1331(d) and 1400(a). Acts giving rise to the causes of action alleged herein have occurred, and are occurring, in the this District.

Answer. Defendants North American and Park deny that they have committed, or are committing, any acts giving rise to the causes of action alleged in the Amended Complaint, either in this district or elsewhere, and neither admit nor deny the remaining allegations of Paragraph 6 of the Amended Complaint, which allegations refer to the applicable statutory and common law

bases of the Amended Complaint, jurisdiction of this Court, and venue, as defendants are not required to either admit or deny such allegations.

7. Amended Complaint. Before May 22, 1980, Namco Limited, a Japanese company created an original audiovisual work titled PUCK-MAN. PUCK-MAN is a wholly original work of authorship with Namco Limited and comprises copyrightable subject matter under the copyright laws of the United States, Title 17, United States Code.

Answer. Defendants North American and Park are without knowledge of the allegations of Paragraph 7 of the Amended Complaint and, therefore, deny the same.

8. Amended Complaint. Namco Limited assigned "the entire right, title, and interest" in statutory copyright in the United States and the Western Hemisphere for the PUCK-MAN audiovisual work to MIDWAY by an "Assignment of Copyrights", dated October 10, 1980 and recorded in the Copyright Office. A copy of the Assignment is attached to this Amended Complaint as Exhibit A.

Answer. Defendants North American and Park are without knowledge of the allegations in Paragraph 8 of the Amended Complaint and, therefore, deny the same, except that they admit that a document titled "Assignment of Copyrights" which purports to be signed by Namco Limited and dated October 10, 1980, was recorded in the Copyright Office.

9. Amended Complaint. MIDWAY changed the name of the PUCK-MAN audiovisual work to PAC-MAN and has secured the exclusive rights in and to all United States copyrights and trademark rights in the PAC-MAN audiovisual work. MIDWAY has complied in all respects with all laws governing the PAC-MAN copyrights. The Register of Copyrights has issued to MIDWAY a certificate of copyright registration for the "Pac-Man Audiovisual Work," Reg. No. PA 83-768, effective November 13, 1980. A copy of Certificate of Registration No. PA 83-768 is attached to this Amended Complaint as Exhibit B.

Answer. Defendants North American and Park admit that the Register of Copyrights has issued Certificate of

Registration No. PA 83-768, but defendants are without knowledge of any other facts concerning the document which purports to be a copy of the Certificate of Registration attached to the Amended Complaint as Exhibit B, and defendants North American and Park are without knowledge of any of the remaining allegations of Paragraph 9 of the Amended Complaint and, therefore, deny the same.

10. Amended Complaint. By agreement effective as of April 27, 1981, MIDWAY granted Namco-America, Inc. an exclusive license under the PAC-MAN copyright and trademark for home video and personal computer use. By agreement also effective as of April 27, 1981 Namco-America, Inc. granted to ATARI the exclusive right in the United States and its territories in the copyright and trademark for the PAC-MAN audiovisual work for home video games and personal computers including exclusive rights under Certificate of Registration No. 83-768. An agreement transferring to ATARI the exclusive rights under copyright and trademark in the PAC-MAN audiovisual work was filed with the Copyright Office for recordation on November 12, 1981. A copy of the agreement recording the transfer rights to Atari in the Copyright Office is attached to this Amended Complaint as Exhibit C.

Answer. Defendants North American and Park admit that a copy of a document purporting to record the transfer of certain rights of Namco-America, Inc. to plaintiff ATARI dated April 27, 1981, is attached to the Amended Complaint as Exhibit C, but defendants North American and Park are without knowledge of the remaining allegations of Paragraph 10 of the Amended Complaint and, therefore, deny the same.

11. Amended Complaint. ATARI holds the exclusive right under all copyrights to the PAC-MAN audiovisual work for home video games and personal computers in the United States and its territories. The Exhibit B Agreement also granted to ATARI exclusive license rights to the trademark

PAC-MAN for use on or in connection with home video games and personal computers in the United States. ATARI has announced the introduction and will introduce the ATARI PAC-MAN home video game throughout the United States in March 1982.

Answer. Defendants North American and Park admit that ATARI has stated in advertisements that ATARI will introduce during 1982 a "PAC-MAN" home video game cartridge for use with its Video Computer System home video game console, deny that Exhibit B attached to the Complaint granted to ATARI exclusive license rights to the trademark PAC-MAN for use on or in connection with home video games and personal computers in the United States, and defendants North American and Park are without knowledge of the remaining allegations of Paragraph 11 of the Amended Complaint and, therefore, deny the same.

12. Amended Complaint. North American and Averett have infringed the copyright in the PAC-MAN audio visual work by reproducing, selling and otherwise distributing and/or performing and displaying unauthorized copies of work under the name K.C. Munchkin.

Answer. Defendants North American and Park deny the allegations of Paragraph 12 of the Amended Complaint.

13. Amended Complaint. North American and Averett are aiding and abetting others to distribute K.C. Munchkin and to publicly perform K.C. Munchkin in retail stores and to induce sales to consumers in violation of plaintiffs' rights.

Answer. Defendants North American and Park deny the allegations of Paragraph 13 of the Amended Complaint.

14. Amended Complaint. ATARI and MIDWAY have expended considerable effort and sums of money in developing, manufacturing, advertising and marketing PAC-MAN in the United States. To date, MIDWAY has sold in excess of 95,000 coin operated PAC-MAN video games at a wholesale price in excess of \$175 million dollars. ATARI has booked orders for over one million PAC-MAN home video games.

Answer. Defendants North American and Park are without knowledge of the allegations of Paragraph 14 of the Amended Complaint and, therefore, deny the same.

15. Amended Complaint. As a result of MIDWAY's advertising, promotion and sales, the public has come to identify the mark PAC-MAN and the non-functional design features of PAC-MAN with MIDWAY. Both the mark PAC-MAN and the non-functional design features of the PAC-MAN audiovisual work have acquired a secondary meaning associating them with MIDWAY.

Answer. Defendants North American and Park are without knowledge of the allegations of Paragraph 15 of the Amended Complaint and, therefore, deny the same.

16. Amended Complaint. Defendants have simulated the non-functional design features of PAC-MAN in K.C. Munchkin, which defendants have sold, advertised, and offered for sale.

Answer. Defendants North American and Park deny the allegation of Paragraph 16 of the Amended Complaint.

17. Amended Complaint. Defendants have aided and abetted and have knowingly induced others to sell, advertise and offer for sale K.C. Munchkin as a home version of PAC-MAN, thus creating the false impression that K.C. Munchkin is somehow backed by, sponsored by, made by or otherwise associated with plaintiffs. Defendants' conduct as hereinabove alleged has confused and is likely to confuse the public.

Answer. Defendants North American and Park deny the allegations of Paragraph 17 of the Amended Complaint.

18. Amended Complaint. North American directly or indirectly is advertising, distributing and selling its infringing K.C. Munchkin home video game on a nationwide basis. A full page color advertisement for the K.C. Munchkin home video game appeared in the November 16, 1981 issue of Newsweek magazine. A copy of the advertisement is attached to this Amended Complaint as Exhibit D. North American has also directly or indirectly advertised the K.C. Munchkin home video game in Time, People and various inflight airline magazines. North American is directly or indirectly also engaged and is currently engaging in a nationwide television advertising campaign for K.C. Munchkin.

Answer. Defendants North American and Park admit that North American or a corporation related to it has advertised, distributed, and sold a "K.C. MUNCHKIN" home video game cartridge on a nationwide basis, that a color advertisement referring to the "K.C. MUNCHKIN" home video game cartridge appeared in the November 16, 1981 issue of Newsweek magazine, that a copy of a portion of that advertisement is attached to the Amended Complaint as Exhibit D, and that arrangements for additional national advertising referring to the "K.C. MUNCHKIN" home video game cartridge had been made, but otherwise deny the allegations of Paragraph 18 of the Amended Complaint.

19. Amended Complaint. Averett licensed, assigned and/or otherwise conveyed the rights in K.C. Munchkin with the intent and knowledge that North American would advertise, market, and distribute K. C. Munchkin for retail sale. North American and Averett have provided and are currently providing distributors and retail dealers with the instrumentality and opportunity to engage in deceptive and unfair trade practices and, on information and belief, Averett and North American, directly or indirectly, have caused, encouraged and contributed to such deceptive and unfair trade practices. These deceptive and unfair trade practices include passing off the K.C. Munchkin home video game as a PAC-MAN game, causing a likelihood of confusion or of misunderstanding as

to the source, sponsorship, approval, or certification of K.C. Munchkin home video game; causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with or certification by plaintiffs; and otherwise engaging in conduct which creates a likelihood of confusion or of misunderstanding. In addition, the distribution for retail sale of the K.C. Munchkin home video game has provided and is currently providing distributors and retail dealers with the instrumentality and opportunity to infringe the PAC-MAN copyright.

Answer. Defendants North American and Park deny the allegations of Paragraph 19 of the Amended Complaint.

20. Amended Complaint. North American's distributors, or distributors of a corporation related to North American, have and are currently holding out the K.C. Munchkin home video game as a PAC-MAN Game, as exemplified by the advertisement from the November 13, 1981 issue of the Chicago Sun-Times, a copy of which is attached to this Amended Complaint as Exhibit E. North American or a corporation related to it and its distributors have otherwise passed K.C. Munchkin off as the PAC-MAN home video game, have otherwise unfairly competed with ATARI, and have confused and deceived consumers.

Answer. Defendants North American and Park deny the allegations of Paragraph 20 of the Amended Complaint.

21. Amended Complaint. North American's direct or indirect infringement of the PAC-MAN copyright, its simulation of the nonfunctional design features of the PAC-MAN audiovisual work, its unfair competition and its unfair and deceptive trade practices in relation thereto have been willful and deliberate and will continue to plaintiffs' irreparable harm unless enjoined by this Court.

Answer. Defendants North American and Park deny the allegations of Paragraph 21 of the Amended Complaint.

22. Amended Complaint. Averett's activities in developing and promoting PAC-MAN for home video use in K.C. Munchkin constitutes willful and deliberate infringement of the PAC-MAN copyright unfair competition.

Answer. Defendants North American and Park deny the allegations of Paragraph 22 of the Amended Complaint.

23. Amended Complaint. Defendant Park has infringed the copyright in the PAC-MAN audiovisual work by selling and otherwise distributing the K.C. Munchkin home video game and by performing and displaying the K.C. Munchkin home video game.

Answer. Defendants North American and Park admit that the defendant Park has performed and displayed the "K.C. MUNCHKIN" home video game cartridge in conjunction with the Odyssey² home video game console and has sold the "K.C. MUNCHKIN" home video game cartridge, but defendants North American and Park deny that any of said acts have infringed the copyright and otherwise deny the allegations of Paragraph 23 of the Amended Complaint.

24. Amended Complaint. ATARI has notified defendants of these infringements of ATARI's exclusive rights in the PAC-MAN copyright and of the other violations herein alleged and of the filing of this action.

Answer. Defendants North American and Park deny that any notice of infringement, or of any other violations alleged in the Amended Complaint, was given to NORTH AMERICAN by ATARI prior to the filing of this action and otherwise deny the allegations of paragraph 24 of the Amended Complaint.

COUNT ONE

25. Amended Complaint. Paragraphs 1 through 24 are incorporated by reference.

Answer. Paragraphs 1 through 24 of the Answer are incorporated herein by reference.

26. Amended Complaint. The aforesaid acts of North American, Park, and Averett constitute copyright infringement in violation of 17 U.S.C. §§106 and 501.

Answer. Defendants North American and Park deny the allegations of Paragraph 26 of the Amended Complaint.

COUNT TWO

27. Amended Complaint. Paragraphs 1 through 24 are incorporated by reference.

Answer. Paragraphs 1 through 24 of the Answer are incorporated by reference.

28. Amended Complaint. The aforesaid acts of North American, Park, and Averett constitute false representations that K.C. Munchkin is sponsored by, authorized by, or affiliated with plaintiffs in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

Answer. Defendants North American and Park deny the allegations of Paragraph 28 of the Amended Complaint.

COUNT THREE

29. Amended Complaint. Paragraphs 1 through 24 are incorporated by reference.

Answer. Paragraphs 1 through 24 of the Answer are incorporated by reference.

30. Amended Complaint. The aforesaid acts of North American, Park, and Averett constitute deceptive trade practices in violation of the Illinois Uniform Deceptive Trade Practices Act, Ill. Rev.Stat. Ch. 121-1/2, §§311-317.

Answer. Defendants North American and Park deny the allegations of Paragraph 30 of the Amended Complaint.

COUNT FOUR

31. Amended Complaint. Paragraphs 1 through 24 are incorporated by reference.

Answer. Paragraphs 1 through 24 of the Answer are incorporated by reference.

32. The aforesaid acts of North American, Park, and Averett constitute improper and unfair competition with plaintiffs in violation of plaintiffs' rights at common law.

Answer. Defendants North American and Park deny the allegations of Paragraph 32 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

33. Neither of the defendants North American and Park have infringed the copyright which purports to be registered by Certificate of Registration No. PA 83-768.

SECOND AFFIRMATIVE DEFENSE

34. Neither of the defendants North American and Park have committed any acts in connection with the manufacture, advertising or sale of the "K.C. MUNCHKIN" home video game cartridge which constitute violations of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

THIRD AFFIRMATIVE DEFENSE

35. Neither of the defendants North American and Park have committed any acts in connection with the manufacture,

advertising or sale of the "K.C. MUNCHKIN" home video game cartridge which are proscribed by the Illinois Uniform Deceptive Trade Practices Act, Ill.Rev.Stat. ch. 121-1/2, §§311-317.

FOURTH AFFIRMATIVE DEFENSE

36. Defendants North American and Park have not committed any acts in connection with the manufacture, advertising or sale of the "K.C. MUNCHKIN" home video game cartridge which constitute improper and unfair competition with plaintiffs in violation of any of plaintiffs' rights at common law.

COUNTERCLAIM

1. By way of counterclaim under Title 17, United States Code §§101 et seq., Title 28, United States Code, §§1338(a) and 1338(b), the Lanham Act of 1946 as amended, 15 U.S.C. §1051 et seq., Ill. Rev. Stat. Ch. 121-1/2, and Title 28, United States Code §§2201 et seq., defendants North American and Park allege that this Court has jurisdiction over the subject matter of and the parties to this counterclaim, and that there is an actual controversy as appears from the Amended Complaint in this action and from the foregoing Answer, between the plaintiffs and the defendants North American and Park with respect to (a) the validity and

enforceability of plaintiffs' alleged copyright (b) the alleged infringement by defendants North American and Park of said copyright, (c) the alleged acts of false representation by defendants North American and Park, (d) the alleged acts of deceptive trade practices by defendants North American and Park, and (e) the alleged acts of common law unfair competition by defendants North American and Park.

2. The alleged copyright is invalid and unenforceable as asserted against the defendants North American and Park.

3. Neither of the defendants North American and Park has infringed plaintiffs' alleged copyright.

4. Neither of the defendants North American and Park has committed any act constituting a false representation.

5. Neither of the defendants North American and Park has committed any act constituting a deceptive trade practice.

6. Neither of the defendants North American and Park has committed any act of common law unfair competition.

7. Defendants North American and Park have been damaged by plaintiffs' assertion of their alleged copyright in this action, by their assertion that defendants North American and Park have committed acts of false representation, by their assertion that defendants North American and Park have committed acts alleged to constitute deceptive trade

practices, and by their assertion that defendants North American and Park have committed acts of common law unfair competition, and such assertions have been willful and wrongful and without any just cause either in fact or in law.

WHEREFORE, defendants North American and Park demand judgment:

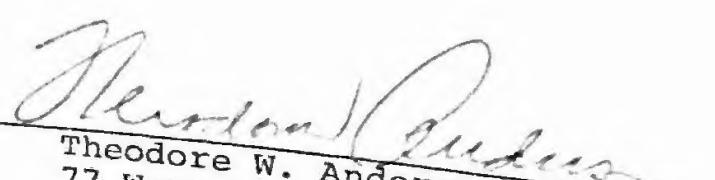
1. That plaintiffs' copyright Registration No. PA 83-768 is invalid, unenforceable and not infringed by any act of the defendants North American and Park;
2. That neither of the defendants North American and Park has committed any act constituting a false representation in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a);
3. That neither of the defendants North American and Park has committed any act constituting a deceptive trade practice in violation of the Illinois Uniform Deceptive Trade Practices Act, Ill.Rev.Stat. Ch. 121-1/2, §§311-317;
4. That neither of the defendants North American and Park has committed any act of common law unfair competition;
5. That plaintiffs are not entitled to any relief prayed for in the Amended Complaint;
6. That plaintiffs' Amended Complaint against the defendants herein be dismissed with costs and disbursements including reasonable attorney fees to be paid by the plaintiffs to the defendants North American and Park;

7. That the amount of damages sustained by defendants North American and Park due to plaintiffs' willful and wrongful assertion of their alleged copyright and claims of false representations, deceptive trade practices and common law unfair competition be trebled, and that plaintiffs be ordered to pay to defendants North American and Park the amount of such trebled damages;

8. That plaintiffs and each of their officers, agents, servants, employees, and attorneys and all those in active concert or participation with them be enjoined and restrained from continuing, maintaining or renewing the allegations of copyright infringement, false representations, deceptive trade practices and common law unfair competition asserted in the Amended Complaint, in any manner, direct or indirect; and

9. That defendants North American and Park be awarded such other and further relief as the Court considers to be just.

By


Theodore W. Anderson
77 West Washington Street
Chicago, Illinois 60602
(312) 346-1200

Of counsel:

James T. Williams
Gregory B. Beggs
Neuman, Williams, Anderson & Olson
77 West Washington Street
Chicago, Illinois 60602
(312) 346-1200

Firm Identification No. 355

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing ANSWER OF DEFENDANTS NORTH AMERICAN PHILIPS CONSUMER ELECTRONICS CORP. AND PARK TELEVISION d/b/a PARK MAGNAVOX HOME ENTERTAINMENT CENTER TO THE AMENDED COMPLAINT, AND COUNTERCLAIM, was served upon the attorneys for the plaintiffs by mailing copies first class postage prepaid to them at the following addresses:

Daniel W. Vittum, Jr.
Robert G. Krupka
David E. Springer
Martin L. Lagod

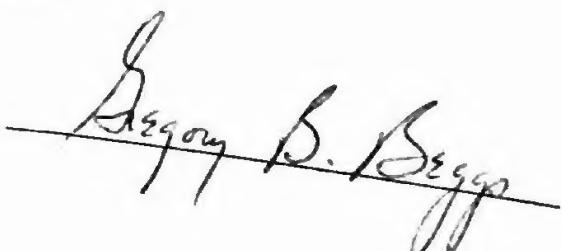
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601

and

Eric C. Cohen
A. Sidney Katz
Donald L. Welsh

FITCH, EVEN, TABIN,
FLANNERY & WELSH
Suite 900
135 South LaSalle Street
Chicago, Illinois 60603

all this 17th day of March, 1982.



Gregory B. Begg